THE PROSECUTORS' MANUAL

CHAPTER 18 – Rule 26 – Sentencing

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I. INTRODUCTION

In 1978, the Arizona legislature enacted a revised criminal code which replaced the prior indeterminate sentencing policy with a policy of "presumptive" sentencing. *State v. Thurlow*, 148 Ariz. 16, 18-19, 712 P.2d 929, 931-32 (1986). "Specifically, the code classifies crimes by placing them into groups of similar gravity and then establishing a presumptive sentence for each group of crimes." *Id.* at 19. However, while it was the legislature which determined the range of punishment appropriate for a given crime, "the ultimate responsibility for fitting the punishment to the circumstances of the particular crime and individual defendant still rests with the judiciary." *Id*. *See also* A.R.S. § 13-702(D) and (E) (deviation from a presumptive sentence based on aggravating or mitigating circumstances is left to a judge's discretion).

The judiciary's role in sentencing is obviously an important one. Therefore, Rule 26 of the Arizona Rules of Criminal Procedure, (the rule which corresponds to sentencing), has been implemented to help judges with sentencing. The comment to Rule 26 states: [Rule 26] "is intended to create a comprehensive procedure which will provide the sentencing judge with the information and flexibility necessary for making dispositional decisions which will promote the defendant's rehabilitation and protect the welfare of society." It is interesting to point out that while this comment suggests the purpose of sentencing to be a defendant's rehabilitation, the particular sections of the criminal code which deal with sentencing are designed to perpetrate retribution. *See* A.R.S. § 13-101(c). So which purpose will prevail? It appears to depend upon whether a proceeding is deemed to be procedural by the court, for if it is procedural, the court's rule, not the legislature's, will prevail. *See e.g. State v. Robinson*, 153 Ariz. 191, 735 P.2d 801 (1987). Therefore, for current purposes, it looks like a sentencing judge may rely on the parameters of Rule 26 when exercising the limited discretion granted by the code's sentencing scheme.

Although a judge may have the final say in declaring what sentence is to be imposed, the prosecutor's job in sentencing is also important. For instance, the prosecutor still has the power to affect a sentence that may be imposed on a defendant through charge and sentence bargaining. *See* S. Saltzburg, *American Criminal Procedure,* 2nd Ed., p. 1012. Furthermore, because of the amount of judicial discretion that may be used in sentencing, it is important for the prosecutor to understand sentencing so he/she may guide the judge in determining a defendant's sentence.

This section is a guide to Rule 26. It was written with the intention of helping the prosecutor understand (a little more than before) the procedure of sentencing and the judiciary's role in sentencing.

II. OVERVIEW

A sentence is the penalty imposed by a court upon a defendant after a judgment of guilt. Rule 26.1(b). A determination of guilt has been made when a jury or court delivers a guilty verdict or a court accepts a plea of guilty or no contest. Rule 26.1(c). This term, "determination of guilt", is used to provide a clear reference point from which the time limits in Rule 26 run. Rule 26.1, comment.

A determination of guilt differs from a judgment in that a judgment is the formal decree made by the court that

establishes whether the defendant is guilty or not guilty. Such a decree or adjudication may be based upon the verdict of a jury, upon the plea of the verdict of the defendant, or upon a court's own finding following a non-jury trial. Rule 26.1(a). According to Rule 26.2(b), once a determination of guilt has been made on any charge or on any count of any charge, then judgment pertaining to that count or that charge is to be pronounced and entered at sentencing. *See also* Rule 26.2, comment. Thus, a judgment is subsequent to a determination of guilt, and is rendered at the sentencing, not at the guilt phase.

A. Judgment

1. Acquittal

If a defendant receives a partial or full acquittal on any charge or on any count of any charge, judgment must be rendered immediately on that acquittal. Rule 26.2(a) and Rule 26.2(a), comment. This rule exists in order to provide grounds for a defendant's motion to set or reconsider conditions for his release. Rule 26.2, comment.

2. Guilty Plea

Under Rule 17.3, if a defendant pleads guilty or no contest, a court is required to determine not only that the plea is being given voluntarily, but also that there exists a factual basis for that plea. However, if prior to judgment, a court accepts a plea of guilty or no contest but has not made the affirmative finding of a factual basis for that plea, then the court must make that actual determination before it enters its judgment. Rule 26.2(d). In making such a determination, the court may consider one or more of the following sources: (1) statements made by the defendant; (2) police reports; (3) reporter's transcripts of the proceedings before the grand jury; and (4) other satisfactory information. Rule 26.2(d). The responsibilities of the court are discussed thoroughly in the "Plea Agreements" chapter in Volume I of The Prosecutors Manual.

3. Pronouncement of Judgment

Once the judgment of conviction is orally pronounced in open court, the judgment becomes complete and valid. Rule 26.16(a).

> In pronouncing judgment on non-capital counts, the court shall set forth the defendant's plea, the offense of which the defendant was convicted or found guilty, and a determination of whether the offense falls in the categories of dangerous, nondangerous, and repetitive or non-repetitive.

Ariz. R. Crim. P. 26.10; *See also* A.R.S. § 13-604.

III. Time Constraints on Sentencing

A. General Rule

A sentence becomes complete and valid at the time of its oral pronouncement in open court. Rule 26.16.

Once a determination of guilt is delivered, a court is required to set a date for the sentencing at least 15 days and no more than 30 days after that determination. Rule 26.3(a). The time limits of this rule are not jurisdictional. *State v. Smith*, 112 Ariz. 208, 209, 540 P.2d 680, 681 (1975). The purpose of this designated period of time is to provide the probation department sufficient time to prepare a thorough presentence report and to give the defendant ample time to examine the report and make objections, without

unduly prolonging the proceedings. See Rule 26.3(a), comment; *See also State v. Carter,* 151 Ariz. 532, 534, 729 P.2d 336, 338 (App. Div. 1 1986). There are two exceptions to this time limit.

B. Exceptions

1. Request for Early Pronouncement

The first exception, granted under Rule 26.3(a), allows a defendant, after the court has advised him/her of his right to a presentence report, to request that the sentence be pronounced earlier than the designated time limit. This exception exists in order "to accommodate the out-of-town defendant who will be fined or placed on probation and for whom it would be a needless hardship to be required to return at a later date for sentencing." Rule 26.3(a), comment.

Note that if a defendant makes such a request, the presentence report becomes optional under 26.4(a). Rule 26.3(a), comment. The waiver of a presentence report cannot be inferred; it must be explicitly stated by the defendant. *State v. Garcia,* 112 Ariz. 363, 542 P.2d 22 (1975). If the court believes that a mental health examination or diagnostic center evaluation of the defendant is necessary, a defendant's request to have an earlier pronouncement of sentence should not be granted. Rule 26.3(a), comment.

2. Good Cause Exception

The second exception to the required time is contained in Rule 26.3(b). Under this exception, "[t]he court may delay sentencing for up to 60 days on a showing of good cause or when a request for a pre-sentencing hearing is filed." Rule 26.3(b), comment. (Pre-sentencing hearings are covered by Rule 26.7. However, the granting of time extensions in the sentencing process should not be encouraged. *See State v. Cornwall,* 114 Ariz. 502, 504, 562 P.2d 382, 384 (App. Div. 1 1977), aff'd 114 Ariz. 550, 562 P.2d 723 (1977).

According to the comment to Rule 26.3(b), this good cause exception exists in order to permit psychiatric examination or diagnostic testing of the defendant under Rule 26.5 and A.R.S. § 13-605, (formerly § 13-1658), and a full and fair hearing. In *State v. Smith,* 112 Ariz. 208, 209, 540 P.2d 680, 681 (1975), good cause was found to uphold the delay in sentencing where the probation department sought the delay because much of the information contained in the presentence report was from a different state. Thus, the delay would be for the defendant's benefit. Therefore, "good cause" for delay may apparently be found for reasons other than psychiatric examination.

If a delay is granted for good cause, but the defendant fails to object to it, he must later show that he has been prejudiced by the delay before it will be deemed reversible error. *See e.g. State v. Young,* 112 Ariz. 361, 363, 542 P.2d 20, 22 (1975); *State v. Cornwall, supra*.

IV. PRESENTENCE REPORTS AND MENTAL HEALTH & DIAGNOSTIC EVALUATIONS

A. The Presentence Report

The presentence report is a report prepared by a probation officer after conducting an investigation into several factors regarding a defendant and the crime for which he/she is to be sentenced. See A.R.S. § 12-253(4). This report "serves an important function in providing the sentencing judge with further information concerning the character and background of the defendant, which facts are helpful in imposing a proper

sentence." *State v. Clabourne,* 142 Ariz. 335, 346, 690 P.2d 54, 65 (1984). "It is a task of the sentencing judge to weigh all the material in a [presentence] report." *State v. Stanhope,* 139 Ariz. 88, 94, 676 P.2d 1146,1152 (App. Div. 2 1984). It is error for a judge not to review a presentence report, but if there was no prejudice to defendant, it is not reversible error. *Clabourne, supra.*

1. Content

The material in the report must fairly and accurately reveal the results of the investigation which produced the background information for the report. *State v. Stanhope,* 139 Ariz. 88, 94, 676 P.2d 1146, 1152 (App. Div. 2 1984). Prior incidents that did not result in convictions may be used in the presentence report. *State v. Stuck,* 154 Ariz. 16, 23, 739 P.2d 1333, 1340 (App. Div. 1 1987); *State v. Cawley,* 133 Ariz. 27, 648 P.2d 142 (App. Div. 2 1978). Furthermore, the mere fact that the contents of a report may be adverse to a defendant do not make the report biased. *Stanhope, supra.* Because a defendant could be placed in a position where he would be expected to disclose to the probation officer facts and versions of the offense that he would not be disclosing at trial, (and that would inevitably turn up in the report), the rule provides that the presentence report should not be prepared until after the determination of guilt is made or the defendant has entered a guilty or no contest plea. Rule 26.4(a), and Rule 26.4(a), comment. *C.f. State v. Kerekes,* 138 Ariz. 235, 236, 673 P.2d 979, 980 (App. Div. 1 1983) (a defendant has a constitutional right not to answer questions put to him by the presentence investigator); *But see State v. Cawley,* 133 Ariz. 27, 648 P.2d 142 (App. Div. 2 1982) (a defendant is not entitled to *Miranda* warnings during presentence investigation where investigation not accusatory in nature).

2. Disclosure of the Presentence Report

Unless a request has been granted under Rule 26.3(a) for earlier pronouncement of sentence, the presentence report must be delivered to the judge and to the parties at least two days prior to sentencing. Rule 26.4(b) and 26.6(b). Both the prosecutor and defense counsel, or if he/she is without counsel, the defendant, shall be given permission by the court to inspect the presentence report. Rule 26.6(a).

However, "a defendant's right to inspect a presentence report is within the discretion of the trial court." *State v. Gunter,* 132 Ariz. 64, 72, 643 P.2d 1034, 1042 (App. Div. 1 1982). This discretion appears to be relatively broad. In *Gunter,* even though the defendant was not given an opportunity to review nor to correct the errors in the presentence report, he was not entitled to an evidentiary hearing because he failed to provide evidence showing he had no chance to review and no colorable claim existed to show the report was false.

A court is allowed to excise particular information from a presentence report. Rule 26.6(c). The Rule lists the kinds of information which can be excised from reports, namely:

(1) Diagnostic opinions which may seriously disrupt a program of rehabilitation,
(2) Sources of information obtained on a promise of confidentiality and,
(3) Information which would disrupt an existing police investigation.

If a court chooses not to disclose a portion of a presentence report, it must inform the parties of its non-disclosure and must state on the record its reasons for making the excision. Rule 26.6(c). *But see State v. Donahoe,* 118 Ariz. 37, 46-47, 574 P.2d 830, 839-40 (App. Div. 2 1977) (failure of trial court to inform parties on the record its reasons for excising information in a presentence report was not reversible error where report itself revealed reasons). The portions of a report a court makes unavailable to one party must be made unavailable to the other party. Rule 26.6(a). If necessary, a trial court is allowed to review a presentence report *in camera* and disclose only the exculpatory portions to the defense. *See State v. Lukezic,* 143 Ariz. 60, 66,

691 P.2d 1088, 1094 (1984) (trial court was permitted to review the report *in camera* and disclose exculpatory portions to the defense where a legitimate concern for the protection of an accused witness was credibly invoked); *See also Mitchell v. Superior Court,* 142 Ariz. 332, 690 P.2d 51 (1984).

Furthermore, the trial court's obligation to disclose the presentence report does not mean the court is also obligated to disclose all conversations which may occur between the sentencing judge and the probation officer who makes the presentence report. *See State v. Mendibles,* 129 Ariz. 124, 126, 629 P.2d 91, 93 (App. Div. 2 1981) (due process does not require every conversation between sentencing judge and probation officer to be disclosed) and *State v. Martinez,* 121 Ariz. 62, 588 P.2d 355 (App. Div. 2 1978).

3. Requesting the Report

If a court has discretion over the penalty to be imposed, it shall require a presentence report to be made. Rule 26.4(a). However, requiring a report is discretionary in the following situations: (1) where defendant can only be sentenced to imprisonment for less than one year, (2) where defendant, under Rule 26.3(a), requests that his sentence be pronounced earlier, or (3) where a presentence report concerning the defendant is already available, (for example, where case has been remanded for sentencing). Rule 26.4(a), and Rule 26.4(a), comment. Yet, even when one of these situations arises, a court will not be precluded from requesting a presentence report. Rule 26.4(a), comment. Furthermore, in regard to the third situation, if the attorneys bring to the attention of the court, or if the court itself finds indications which imply significant changes in the defendant or his environment since the previous report was prepared, a new presentence report should be ordered. Rule 26.4(a), comment.

The following cases have dealt with the issue of whether a sentencing court was required to order an original or new sentencing report:

State v. Cornell, 179 Ariz. 314, 333, 878 P.2d 1352, 1371 (1994).

> After the verdict was read, the *pro se* defendant declared in open court that he would not meet with the probation officer preparing the presentence report. The trial judge was not obligated to give the defendant time to cool off and ask him later whether he wanted to be interviewed for the report. Moreover, it was not err to comply with the defendant's wish when he could show no prejudice resulted from the decision to invoke his right not to speak with the probation officer for sentencing purposes.

State v. Clabourne, 142 Ariz. 335, 346, 690 P.2d 54, 65 (1984).

> Once the trial court concluded that the original report had been prepared in violation of defendant's right against self-incrimination, it was not required to order a new report *sua sponte* but could instead rely on the evidence presented at trial and at the sentencing hearing.

State v. McVay, 131 Ariz. 369, 371, 641 P.2d 857, 859 (1982).

> An updated presentence report was unnecessary where the court's only exercise of discretion was to accept or reject the plea agreement that stipulated to a life sentence.

State v. Quatsling, 125 Ariz. 255, 257, 609 P.2d 70, 72 (App. Div. 2 1980).

> There was no error made by the trial court when it did not order a presentence report after defendant's escape in the second degree. Here, the court adequately advised the defendant of his presentence rights

and defendant affirmatively waived those rights.

State v. Mendibles, 129 Ariz. 124, 125, 629 P.2d 91, 92 (App. Div. 2 1981).

> The court's decision not to require another presentence report to be presented at the revocation of probation proceeding was not an abuse of discretion.

B. Diagnostic Evaluations and Mental Health Examinations

It is a violation of the due process protections of the Fifth and Fourteenth Amendments to convict an incompetent person. *State v. Wagner,* 114 Ariz. 459, 462, 561 P.2d 1231 (1977), citing *Drope v. Missouri,* 420 U.S. 162, 955 S.Ct. 896 (1975) and *Pate v. Robinson,* 383 U.S. 375, 86 S.Ct. 836 (1966). In order to guarantee this protection, Arizona has developed Rule 11 of the Arizona Rules of Criminal Procedure. This rule stands as the procedural mechanism used in determining both the defendant's competence at any stage of the proceedings and the defendant's mental status at the time of the offense. See Rule 11.2.

1. Competence to be Sentenced

Because it is unconstitutional to convict an incompetent person, the issue of a defendant's competence plays an important role at sentencing. Rule 11.1 specifically states:

> A person shall not be tried, convicted, sentenced or punished for a public offense while, as a result of a mental illness or defect, he is unable to understand the proceedings against him or to assist in his own defense.

Emphasis added.

Thus, when a defendant is being sentenced, his or her competence must be ensured. Note that, with respect to sentencing, the competency standard is the same as the standard enumerated in Rule 11.1. *C.f. State v. Montano,* 136 Ariz. 605, 608, 667 P.2d 1320, 1323 (1983).

Rule 26.5 empowers the court to order a defendant to undergo a mental health examination or diagnostic evaluation. Any reports from examiners or evaluators are due at the same time as the presentence report (two days before sentencing). See Rule 26.5, comment. The rule "uses the word 'may', placing the decision to order these tests within the judge's discretion. *C.f. State v. Woods,* 114 Ariz. 385, 390, 561 P.2d 306, 311 (1977)." *State v. Clabourne,* 142 Ariz. 335, 347, 690 P.2d 54, 66 (1984). This means that even if a defendant requests such evaluations or examinations to be made, the court is under no duty to grant that request. *Id.* However, the trial court should order an examination when it finds it needs more information to determine whether a mitigating factor may exist. *State v. Williams*, 183 Ariz. 368, 381, 904 P.2d 437, 450 (1995).

Moreover, under Rule 11.3(a), if reasonable grounds exist to question a defendant's competence, an examination and hearing must be ordered. The court retains broad discretion on the "reasonable grounds" determination. *See State v. Rodriguez,* 145 Ariz. 157, 700 P.2d 855 (App. Div. 1 1984), overruled on other grounds, *State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996). *See also* Rule 11, *et. seq*. and Volume III, Prosecutor's Manual, "Rule 11". But be careful! Under Rule 11.2, not only the court, but all of the parties (including the prosecution) have an affirmative duty to ensure a defendant's competence. *C.f. State v. Starcevich,* 139 Ariz. 378, 678 P.2d 959 (App. Div. 2 1983). Failure to do so is reversible error.

2. Incompetence As Mitigation In Sentencing

A court's power to order these tests is important not only in determining a defendant's competence to be sentenced but also in determining possible mitigation under A.R.S. §13-701(E)(2). *C.f. State v. Clabourne,* 142 Ariz. 335, 690 P.2d 54 (1984)(referring to § 13-751(G)(1), which is the same as § 13-701(E)(2), but for the reference to the death penalty). Rule 26.5, therefore, allows a court to order a defendant to undergo the specified tests if and when the court feels it needs more information in determining whether the mitigating factor of A.R.S. § 13-701(E)(2) exists. *See id.* (again, referring to § 13-751(G)(1) instead of § 13-701(E)(2)).

3. Self-Incrimination and Examinations

"[W]here a defendant requests a mental health examination pursuant to Rule 26.5, the psychologist-patient privilege does not exist." *State v. Ortiz,* 144 Ariz. 582, 584, 698 P.2d 1301, 1303 (App. Div. 1 1985). *See also Appeal in Pima County Mental Health Case No. MH1717-1-85,* 149 Ariz. 594, 721 P.2d 142 (App. Div. 2 1986) (privilege does not attach when a court-ordered mental examination is not intended to be confidential.)

The more difficult issue is whether the privilege against self-incrimination exists. The leading case in this area is *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866 (1981). In *Estelle,* the Supreme Court found that the defendant's Fifth Amendment privilege against self-incrimination was violated when the psychiatrist's findings were used in assessing the defendant's dangerousness during sentencing. The results of the exam were to be used only for the purpose of determining his competency to stand trial. Thus, when the findings were used for sentencing, they were used beyond the defendant's expectations. The Court stated:

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to [the doctor] to establish his future dangerousness. If, upon being adequately warned, respondent had indicated that he would not answer [the doctor's] questions, the validly ordered competency examination nevertheless could have proceeded upon the condition that the results would be applied solely for that purpose. In such circumstances, . . . the State must make its case on future dangerousness in some other way."

Id. at 468-69, 101 S.Ct. at 1876. *But see Buchanan v. Kentucky*, 483 U.S. 402, 422-23, 107 S.Ct. 2906 (1987) ("[I]f a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.").

Therefore, some warnings must be given before a court-ordered examination or evaluation is administered. Furthermore, if the defendant invokes his Fifth Amendment privilege, the findings can only be used for determining whether the defendant is competent to be sentenced and not for enhancement or mitigation of his or her sentence. Note: The essence of this Fifth Amendment principle appears to rely on the notion that it is the state that carries the burden of offering evidence and proving a defendant's guilt. *See id.* at 462, 101 S.Ct. at 1872 ("'The essence of this basic constitutional principle [the Fifth Amendment privilege] is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officer....'").

The Arizona Court of Appeals has relied on *Estelle* in establishing that a defendant "has a constitutional right not to provide information to be used in connection with his sentencing and that to penalize him for invoking his Fifth Amendment privilege is unconstitutional." *State v. Kerekes*, 138 Ariz. 235, 236, 673 P.2d 979, 980 (App. Div. 1 1983); *State v. Cornell*, 179 Ariz. 314, 878 P.2d 1352 (1994). Because *Kerekes* involved questions put to the defendant by the probation officer and not a psychologist/psychiatrist, it may be implied that this Fifth Amendment privilege may be invoked not only during mental health examination and diagnostic evaluations, but also during a presentence interview conducted by a probation officer. Nevertheless, be aware of the fact that the requirements of *Estelle* seem to apply only to court-ordered evaluations. For example, in *State v. Ortiz,* 144 Ariz. 582, 698 P.2d 1301 (App. Div. 1 1985), the Arizona Court of Appeals distinguished the "court-ordered factor" of *Estelle* and held that the privilege against self-incrimination is not applicable where a defendant admits to other criminal activity in the course of a mental health examination the defendant himself requested. This decision apparently relies on the assumption that there is no element of coercion involved when an exam is administered at the defendant's request. *Id.* at 584, 698 P.2d at 1303. *See also Williams v. Stewart*, 441 F.3d 1030 (9th Cir. 2006) (*Miranda* warnings were not required prior to mental health exam performed at his request).

As intimated above, the defendant has a Fifth Amendment right not to incriminate himself during conversations with the probation officer. *Miranda* warnings are not required even if the probation officer knows that incriminating material will be discussed and the defendant's probation conditions require him to talk with the probation officer. That was the situation of the defendant in *Minnesota v. Murphy,* 465 U.S. 420, 104 S.Ct. 1136 (1984). Defendant's probation requirements for his false imprisonment conviction required him to be truthful with the probation officer 'in all matters.'" *Id*. at 422, 104 S.Ct. at 1139. The probation officer heard that defendant had confessed a rape and murder, and called him into the office to ask him about the crime. *Id*. at 423, 104 S.Ct. at 1140. Defendant was not given *Miranda* warnings and confessed to the rape and murder. *Id* .The United States Supreme Court upheld admission of the statements and upheld the defendant's first degree murder conviction. *Id.* at 427, 104 S.Ct. at 1142.Unfortunately, Rule 26.6(c)(2) prohibits subsequent use of any statements made to the probation officer preparing the presentence report, so this discussion of the Fifth Amendment is largely academic for statements made during presentence report interviews.

4. Disclosing the Diagnostic and Mental Health Reports

All diagnostic and mental health reports may be inspected by the prosecutor, defense counsel, or if he/she is without counsel, the defendant. Rule 26.6(a). These reports shall be made available to the parties at least two days prior to sentencing. Rule 26.6(b). However, the court does have the discretion to excise from these reports:

(1) Diagnostic opinion which may seriously disrupt a program of rehabilitation,

(2) Sources of information obtained on a promise of confidentiality and,

(3) Information which would disrupt an existing police investigation.

Rule 26.6(c).

Although the rule specifically orders the court to inform the parties and state on the record its reasons for making an excision from the presentence report, it has no specific provision for the diagnostic and mental health reports. This implies the court does not have the same duty with such reports.

C. Need for Information Subsequent to Presentence Investigation

The situation may arise where, following the presentence investigation, the court becomes aware of the need for more information on the defendant to assist it in imposing sentence. If this occurs, the court has three options to choose from: (1) diagnostic commitment of the defendant to the department of corrections (A.R.S. § 13-605(A)), or (2) diagnostic commitment of the defendant to a diagnostic facility (A.R.S. § 13-605(B)), or (3) evaluation of defendant with no commitment.

1. D.O.C. Commitment

A.R.S. § 13-605(A) states: "If after presentence investigation, the court desires more detailed information as a basis for determining the sentence to be imposed, it may commit the defendant to the custody of the department of corrections." Thus, Rule 26.5 offers a flexible alternative to the commitment process of this statute by allowing examinations, not commitment, at any time prior to sentencing. See Rule 26.5, comment.

The reason for commitment is not solely for a determination on the defendant's mental health, but is to aid the court in sentencing.

A commitment under this section may be accepted only when there is adequate staff and facilities available. A.R.S. § 13-605(A). If a commitment is accepted, the court is to be notified of the acceptance along with specifications of the time and place the defendant is to be received. A.R.S. § 13-605(A). The time limit imposed on commitment of a defendant to DOC facilities cannot exceed 90 days. A.R.S. 13-605(B). Therefore, the 60 day extension period for sentencing granted under Rule 26.3(b) may be extended to 90 days when a defendant is committed to the DOC for evaluation. See Rule 26.3(b), comment.

Once a defendant is committed, the Department is required to conduct a complete study on the prisoner. A.R.S. § 13-605(A). When the period of commitment expires, the facility "shall provide the court with a written report of the results of the study, including whatever recommendations the department believes will be helpful in determining disposition of the case." A.R.S. § 13-605(A). Subsequently, once the report and recommendations are received, the court shall then sentence the defendant as authorized under § 13-603, unless a further diagnostic commitment is ordered under § 13-605(B). A.R.S. § 13-605(A).

If the defendant is sentenced, the period of defendant's commitment shall be credited to the sentence imposed. A.R.S. § 13-605(D).

2. Diagnostic Facility Commitment

Many of the same provisions listed in § 13-605(A), are listed in § 13-605(B), which covers diagnostic facility commitment of a defendant prior to sentencing. However, the purpose of a diagnostic commitment under § 13-605(B), unlike D.O.C. commitment, is psychiatric evaluation. This purpose exists in case the court desires more detailed information about the defendant's mental condition.

The time limitation for both types of commitment is the same - 90 days. A.R.S. § 13-605(B). Nevertheless, a defendant could conceivably be committed for up to 180 days. This would happen if, after being committed to D.O.C. or a diagnostic facility for a full 90 day period, the court then decides (after receiving reports and recommendations) the defendant should be committed to the other type of facility for another 90 days. See A.R.S. § 13-605(A) and (B). Either way, if the defendant is ultimately sentenced, all the time that he or she spent in a facility will be credited to the sentence imposed. A.R.S. § 13-605(D).

3. Evaluation Without Commitment

The comment to Rule 26.5 points out that a court is permitted to delay sentencing even if the need for a mental health examination or evaluation is not revealed until after the presentence report is prepared or if the need does not become apparent until a prehearing conference. However, contrary to the code provisions listed above, this provision does not allow for a 90 day delay but, instead, allows for a sentencing delay up to an aggregate of 70 days after the determination of guilt. This implies that if a court does not realize the need for the defendant to be examined until after the presentence report has been made or until implementation of the prehearing conference, the defendant need not be committed, but instead, may be examined within the next 40-55 days (depending on how long it took to produce the presentence report).

D. Disclosure of Reports After Sentencing

1. Disclosure to the Courts and Facilities

After a defendant has been sentenced, Rule 26.6(d)(1) requires all diagnostic, mental health and presentence reports regarding a defendant to be provided to the people who have "direct responsibility for the custody, rehabilitation treatment and release of the defendant." This rule directly prohibits any portion of a report which was excised under Rule 26.6(c)(2) and (c)(3) to be provided.

When a relevant issue has been raised, a reviewing court will also be entitled to the above listed reports, and any excised portions. Rule 26.6(d)(1).

2. Disclosure of Presentence Report for Evidence

It is important to remember that "[n]either a presentence report nor any statement made in connection with its preparation shall be admissible as evidence in any proceeding bearing the issue of guilt." Rule 26.6(d)(2), (emphasis added). The rule precludes the admission of such statements in any trial that is either related or unrelated to the case which produced the statement(s). *State v. Burciaga,* 146 Ariz. 333, 335,705 P.2d 1385, 1386 (App. Div. 1 1985) (held that Rule 26.6(d)(2) applied to unrelated case too); *State v. Williams*, 209 Ariz. 228, 99 P.3d 43 (App. Div. 1 2004). According to an earlier comment to the rule, the rule's purpose is to encourage defendants to be candid with the probation officers who are preparing their reports. See 17 A.R.S. Rules Crim.Proc., Rule 26.6(d)(2) (1975); *See also State v. Vaughan,* 124 Ariz. 163, 602 P.2d 831 (App. Div. 2 1979). However, this protection that the rule provides apparently does not extend to statements made to third parties who are not probation officers. *State v. Rice,* 116 Ariz. 182, 568 P.2d 1080 (App. Div. 2 1977). Given *Minnesota v. Murphy,* 465 U.S. 420, 1045 S.Ct. 1136 (1984), Rule 26.6(c)(2) should not extend beyond statements made during presentence report interviews.

3. Disclosure of Reports to the Public

Presentence, mental health, diagnostic and prehearing conference reports, prepared under Rules 26.4, 26.5, and 26.7(c) respectively, are matters of public record unless the court provides otherwise. Rule 26.6(e). In *Mitchell v. Superior Court In and For Pima County,* 142 Ariz. 332, 334, 690 P.2d 51, 53 (1984), the Arizona Supreme Court stated that "the proper interpretation of Rule 26.6(e) is that it enacts a general policy of public access while giving the court discretion, where good cause exists, to limit access by order made on an individualized basis in a particular case." The court reasoned that "while confidentiality may be preserved on a case-by-case basis, we recognize that the public's need for information about the disposition of offenders is compelling, and that it is the public policy of this state to fulfill that need." *Id.*at 335, 690 P.2d at 54.

If a party is seeking to stop disclosure to the public, they must show that material harm will result from the disclosure.

> The burden of showing the probability that specific, material harm will result from disclosure, thus justifying an exception to the usual rule of full disclosure, is on the party that seeks non-disclosure rather than on the party that seeks access.

Id.

V. THE PRESENTENCE HEARING

"[T]he purpose of a presentence hearing is to insure that the sentencing judge is fully informed as to the character of the individual to be sentenced and the circumstances of the crime." *State v. Ohta,* 114 Ariz. 489, 492, 562 P.2d 369, 372 (1977). Because a presentence hearing may possibly involve large amounts of evidence and information offered by both the defendant and or prosecution, it is important to have a good understanding of the procedure.

A. Request for a Pre-Sentencing Hearing

Whenever a court has discretion over the penalty to be imposed upon a defendant, it must hold a pre-sentencing hearing if one of the parties requests it, or it may hold one if, based on its own discretion, it so chooses. Rule 26.7(a). Thus, a pre-sentencing hearing will not be mandatory unless one of the parties requests it. *See State v. Smith,* 112 Ariz. 208, 209, 540 P.2d 680, 681 (1975). A party's request for a pre-sentencing hearing may be made at any time. Rule 26.7(a). If counsel for a defendant fails to request a presentence hearing, it will not be deemed ineffective counsel "unless a showing is made that the proceedings were reduced to a farce." *Smith, supra*. If the record indicates that a sufficient inquiry into the defendant's character and the circumstances of the crime was made, the trial court's decision not to hold a presentence hearing will not be overturned. *Id*.

B. Notice of Objections; Special Duty of the Prosecutor

1. Objections by the Parties

If a pre-sentencing hearing has been ordered, the parties must be given an opportunity to examine any presentence, mental health, and/or diagnostic reports, ordered under Rules 26.4 and 26.5, before the hearing can be conducted. See Rule 26.7(b); *But see State v. Gunter*, 132 Ariz. 64, 72, 643 P.2d 1034, 1042 (App. Div. 1 1982) (a defendants' right to inspect a presentence report is within the trial court's discretion).

If any party objects to the content of any report prepared under the above rules or prepared under 26.7(c), (prehearing conference reports), that party must notify the court and all other parties of its objection(s) prior to the day of the pre-sentencing hearing. Rule 26.8(a). Although the court is authorized to remove the objectionable material, it is not required to do so and may, in its discretion, simply choose not to consider it. *State v. McCurdy*, 216 Ariz. 567, 576-77, 169 P.3d 931, 940-41 (App. Div. 2 2007).

2. Prosecutor's Duty

Under Rule 26.8(b), the prosecutor has a special affirmative duty to disclose "any information in [his/her] possession or control, not already disclosed, which would tend to reduce the punishment to be imposed." Rule 26.8(b). *See also State v. Maloney*, 105 Ariz. 348, 464 P.2d 793 (1970) *cert. denied* 400 U.S. 481, 91 S.Ct.

82. This rule is based on the holding in *Brady v. Maryland,* 83 S.Ct. 1194, 373 U.S. 63 (1963). Rule 26.8(b), comment. In *Brady,* the Supreme Court held that a prosecutor may not withhold evidence which may reduce a defendant's penalty because this would cast "the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice...." A failure to disclose mitigating evidence results in different remedies depending on how the evidence would "have effected the defendant and his trial. *See e.g. Brady, supra* (case resulted in only a resentencing because defendant had admitted to his participation in the murder); *State v. Fowler*, 101 Ariz. 561, 422 P.2d 125 (1967) (case remanded for new trial because withheld evidence supported his defense).

C. Timeliness of Presentence Hearing

As previously mentioned, if a pre-sentencing hearing is requested under Rule 26.7, then sentencing may be held within 60 days (instead of 15-30 days) after the determination of guilt. Rule 26.3(b). Therefore, because a sentence may be pronounced at the end of a pre-sentencing hearing, it may be presumed that a pre-sentencing hearing may be held any time within 60 days after the determination of guilt. Of course, if the need for commitment and/or a mental health examination of a defendant is not revealed until after the presentence report is prepared, the time requirement on the pre-sentencing hearing will be different. See Rule 26.5 and A.R.S. § 13-605(A) and (B). The pre-sentencing hearing will not be held until the parties are given an opportunity to examine any reports prepared under Rules 26.4 and 26.5. Rule 26.7(b).

D. Requirements of Open Court and Record

Rule 26.7(b) requires that the pre-sentencing hearing be held in open court, and that a verbatim record be kept of the proceedings.

E. Evidence and Procedures of the Presentence Hearing

1. General Rules

In addition to insuring that the judge is familiar with the defendant and the case, the purpose of the presentence hearing is to allow a party (1) to show aggravating or mitigating circumstances, (2) to show why sentence should not be imposed or (3) correct or amplify the presentence, diagnostic or mental health reports. Rule 26.7(b). In order to meet these purposes, the rules governing the admissibility of evidence at trial will not apply at a sentencing hearing. *See State v. Conn,* 137 Ariz. 148, 149, 669 P.2d 581, 582 (1983). *See also Williams v. Oklahoma,* 358 U.S. 576, 79 S.Ct. 421 (1957)(once defendant's guilt is established, sentencing judge, in determining punishment, is not restricted to evidence from the examination and cross-examination of witnesses in open court). As a general rule, any party at the hearing may introduce any reliable, relevant evidence, including hearsay. Rule 26.7(b). Such evidence may be admitted "in order to show aggravating or mitigating circumstances to show why sentence should not be imposed, or to correct or amplify the presentence, diagnostic or mental health reports." Rule 26.7(b). *See also Conn, supra*.

What constitutes reliable or responsible hearsay is within the discretion of the trial court. *State v. Donahoe,* 118 Ariz. 37, 44, 574 P.2d 830, 837 (App. Div. 2 1977). "Clearly the presentence diagnostic and mental health reports are forms of hearsay." Rule 26.7, comment.

Beyond hearsay is the existing proposition that "a judge may consider information which might not [have been] admissible at a trial but which is certainly relevant for the purpose of sentencing." *State v. Kasold,* 110

Ariz. 563, 556, 521 P.2d 995, 998 (1974). For example, if an item was seized by the police illegally, it may be used as a basis for sentencing. *State v. Benge,* 110 Ariz. 473, 479-80, 520 P.2d 843, 849-50 (1974). *See also U.S. v. Schipani,* 435 F.2d 26 (1971) (relied on in *Benge* for stating as long as evidence is reliable and was not gathered for express purpose of improperly influencing sentencing judge, no error in using it for sentencing).

But be careful!! The relaxation in the traditional evidentiary rules and procedures applicable to the trial stage is not unlimited. "[T]he sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." *Gardner v. Florida,* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204 (1977). Because of this requirement, an involuntary confession may not be considered at sentencing. *State v. Conn,* 137 Ariz. 148, 151, 669 P.2d 581, 584 (1983). Nor may a conviction obtained in violation of a defendant's Sixth Amendment rights be considered in imposing sentences. *United States v. Tucker,* 404 U.S. 443, 92 S.Ct. 589 (1972).

Moreover, in sentencing a defendant after a guilty plea, the court must sentence the defendant for the crime for which he was convicted, not what the court personally believes he committed. *Foster v. Irwin*, 196 Ariz. 230, 233, 995 P.3d 272, 275 (2000) (defendant pled to simple possession but court sentenced based on his belief that defendant possessed drugs for sale).

2. Evidence for Aggravation and Mitigation

The criminal code that is now being implemented replacing the prior indeterminate sentencing policy with a policy of "presumptive" sentencing.

> Specifically, the code classifies crimes by placing them into groups of similar gravity and then establishing a presumptive sentence for each group of crimes. The sentencing judge may then raise or lower this presumptive sentence based on a finding of specified aggravating or mitigating circumstances.

State v. Thurlow, 148 Ariz. 16, 19, 712 P.2d 929, 932 (1986), citing Gerber, *Criminal Law of Arizona,* 91 (1978). Respectively, A.R.S. § 13-701(D) and (E) set forth the aggravating and mitigating circumstances which a court must consider in determining a sentence.

> In determining what sentence to impose the court shall take into account the amount of aggravating circumstances and whether the amount of mitigating circumstances is sufficiently substantial to justify the lesser term.

A.R.S. § 13-701(F).

The list of circumstances presented in these statutes is not exhaustive. Instead, the circumstances which could aggravate and/or mitigate a sentence were made flexible. See A.R.S. §§ 13-702(D)(13) and (E)(5). Because of this flexibility, it is necessary to know what a court may or may not consider in order to aggravate and or mitigate a sentence.

3. Aggravation of Sentence

a. Sixth Amendment Considerations

In *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 2537 (2004), the United States Supreme Court held that "the 'statutory maximum' for *Apprendi [v. New Jersey]* purposes is the maximum sentence a judge may impose

solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." (Emphasis added.) Thus, in order for the court to be able to impose an aggravated sentence, a jury must first find the presence of one or more aggravating circumstances beyond a reasonable doubt if the defendant does not admit an aggravating fact. A.R.S. § 13-701(C). The only exception to this rule is subsection D, paragraph 11 regarding prior felony convictions, which may be found by the trial court. *Id*. *See also State v. Anderson*, 211 Ariz. 59, 60,116 P.3d 1219, 1220 (2005).

Although in many cases you will have to hold a separate trial on aggravating facts after the guilt phase, it may not always be necessary. The aggravating circumstance that exposes a defendant to a sentence greater than the presumptive can be implicit in the jury's verdict. *State v. Martinez*, 210 Ariz. 578, 585, 115 P.3d 618, 625 (2005). Be aware, however, that the court may not be able to rely on a defendant's statement in a plea colloquy to aggravate his sentence if the guilty plea to the charge did not necessarily establish the aggravating factor or the defendant did not waive his right to a jury trial on aggravating factors. *State v. Brown*, 212 Ariz. 225, 231, 129 P.3d 947, 953 (2006). That is why it is a good practice to ensure the defendant explicitly waives his right to trial on the underlying offense and the aggravating factors in his plea agreement.

When a trial court improperly relies on an aggravating factor in violation of *Apprendi* and *Blakely* to subject a defendant to a sentence greater than the presumptive, the appellate court will not "seek out new aggravating circumstances, not found below, to save the constitutionally flawed sentence." *State v. Price*, 217 Ariz. 182, 186, 171 P.3d 1223, 1227 (2007). This is fundamental error that will result in a resentencing even if the defendant fails to object. *Id.* Nevertheless, a *Blakely* error "can be harmless if no reasonable jury, on the basis of the evidence before it, could have failed to find the minimum number of aggravators necessary to expose the defendant to the sentence imposed." *State v. Hampton*, 213 Ariz. 167, 183, 140 P.3d 950, 966 (2006).

Note: There is no presumptive sentence for first degree murder. *State v. Fell*, 210 Ariz. 554, 560, 115 P.3d 594, 600 (2005).

b. Role of the Trial Court After Sixth Amendment is Satisfied

Once the trier of fact has found at least one aggravating circumstance in conformity with the Sixth Amendment, the trial court may then find other aggravating facts by a preponderance of the evidence in order to increase the defendant's sentence above the presumptive. A.R.S. § 13-701(F); *Martinez* at 585, 115 P.3d at 625. Keep in mind, however, that the Sixth Amendment is not violated if the trial court finds aggravating circumstances that do not result in the imposition of a sentence greater than the presumptive term. *See State v. Ramsey*, 211 Ariz. 529, 543, 124 P.3d 756, 770 (App. Div. 2 2005).

When the trial court weighs aggravating and mitigating factors, it should identify the statutory authority for each aggravating circumstance. *State v. Price*, 217 Ariz. 182, 184 n.3, 171 P.3d 1223, 1225 (2007). "The record must show what the information consists of and where it comes from and must indicate that it has some substance above rumor, gossip or speculation." *State v. Jones,* 147 Ariz. 353, 710 P.2d 463 (1985). The evidence which may be used for aggravation includes "all evidence and information presented at all stages of the trial, together with all probation and presentence reports and the testimony presented at the aggravation and mitigation hearing prior to sentencing." *State v. Meador,* 132 Ariz. 343, 346, 645 P.2d 1251, 1260 (App. Div. 1 1982). Thus, for sentencing purposes, the trial judge has a much broader information base than was presented to the jury at trial since the jury can only consider the evidence presented at trial. *See id.*

c. Enumerated Aggravating Circumstances

A.R.S. § 13-701(D) lists the possible aggravating circumstances that a sentencing jury or trial court shall consider. The list is as follows:

1. Infliction or threatened infliction of serious physical injury, except if this circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under section 13-704.
2. Use, threatened use or possession of a deadly weapon or dangerous instrument during the commission of the crime, except if this circumstance is an essential element of the offense of conviction or has been utilized to enhance the range of punishment under section 13-704.
3. If the offense involves the taking of or damage to property, the value of the property taken or damaged.
4. Presence of an accomplice.
5. Especially heinous, cruel or depraved manner in which the offense was committed.
6. The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.
7. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.
8. At the time of the commission of the offense, the defendant was a public servant and the offense involved conduct directly related to the defendant's office or employment.
9. The victim or, if the victim has died as a result of the conduct of the defendant, the victim's immediate family suffered physical, emotional or financial harm.
10. During the course of the commission of the offense, the death of an unborn child at any stage of its development occurred.
11. The defendant was previously convicted of a felony within the ten years immediately preceding the date of the offense. A conviction outside the jurisdiction of this state for an offense that if committed in this state would be punishable as a felony is a felony conviction for the purposes of this paragraph.
12. The defendant was wearing body armor as defined in section 13-3116.
13. The victim of the offense is at least sixty-five years of age or is a disabled person as defined in section 38-492, subsection B.
14. The defendant was appointed pursuant to title 14 as a fiduciary and the offense involved conduct directly related to the defendant's duties to the victim as fiduciary.
15. Evidence that the defendant committed the crime out of malice toward a victim because of the victim's identity in a group listed in section 41-1750, subsection A, paragraph 3 or because of the defendant's perception of the victim's identity in a group listed in section 41-1750, subsection A, paragraph 3.
16. The defendant was convicted of a violation of section 13-1102, section 13-1103, section 13-1104, subsection A, paragraph 3 or section 13-1204, subsection A, paragraph 1 or 2

arising from an act that was committed while driving a motor vehicle and the defendant's alcohol concentration at the time of committing the offense was 0.15 or more. For the purposes of this paragraph, "alcohol concentration" has the same meaning prescribed in section 28-101.

17. Lying in wait for the victim or ambushing the victim during the commission of any felony.

18. The offense was committed in the presence of a child and any of the circumstances exists that are set forth in section 13-3601, subsection A.

19. The offense was committed in retaliation for a victim either reporting criminal activity or being involved in an organization, other than a law enforcement agency, that is established for the purpose of reporting or preventing criminal activity.

20. The defendant was impersonating a peace officer as defined in section 1-215.

21. The defendant was in violation of 8 United States Code section 1323, 1324, 1325, 1326 or 1328 at the time of the commission of the offense.

22. The defendant used a remote stun gun or an authorized remote stun gun in the commission of the offense. For the purposes of this paragraph:

(a) "Authorized remote stun gun" means a remote stun gun that has all of the following: (i) An electrical discharge that is less than one hundred thousand volts and less than nine joules of energy per pulse. (ii) A serial or identification number on all projectiles that are discharged from the remote stun gun. (iii) An identification and tracking system that, on deployment of remote electrodes, disperses coded material that is traceable to the purchaser through records that are kept by the manufacturer on all remote stun guns and all individual cartridges sold. (iv)A training program that is offered by the manufacturer.

(b) "Remote stun gun" means an electronic device that emits an electrical charge and that is designed and primarily employed to incapacitate a person or animal either through contact with electrodes on the device itself or remotely through wired probes that are attached to the device or through a spark, plasma, ionization or other conductive means emitting from the device.

23. During or immediately following the commission of the offense, the defendant committed a violation of section 28-661, 28-662 or 28-663.

d. "Catch-All" Aggravating Circumstances

In addition to the 23 enumerated aggravating circumstances, the statute permits the trial court to consider "[a]ny other factor that the state alleges is relevant to the defendant's character or background or to the nature or circumstances of the crime." A.R.S. § 13-701(D)(24). This "catch-all" aggravating factor makes the number of possible aggravating circumstance to be found by a court virtually limitless. However, some limitations have been imposed.

The trial court may not increase a defendant's sentence beyond the presumptive term based solely on the catch-all aggravator of A.R.S. § 13-701(C)(24). To do so violates the due process prohibition against vague laws. *State v. Schmidt*, 220 Ariz. 563, 566, 208 P.3d 214, 217 (2009). The court may, however, use the catch-all aggravator to impose a sentence up to the statutory maximum. *Id*. *See also State v. Perrin*,

222 Ariz. 375, 214 P.3d 1016 (App. Div. 2 2009) (trial court erred in giving defendant a substantially aggravated sentence using one enumerated factor and two catch-all factors).

(i). Examples of Acceptable Aggravating Circumstances

Elements of the crime may be used as an aggravating circumstance if it is one of the enumerated aggravating factors in A.R.S. § 13-701(D) or as a "catch-all" factor if rises to the level beyond what is necessary to establish the elements of the offense. *State v. Tschilar*, 200 Ariz. 427, 435, 27 P.3d 331, 339 (App. Div. 1 2001).

Note: If the element of dangerousness cannot be used to enhance the current sentence, it is proper to submit dangerousness allegations. *State v. Sammons,* 156 Ariz. 51, 749 P.2d 1372 (1988) (armed robbery found dangerousness, sentenced as nondangerous because 2 priors were nondangerous); *State v. Woodall,* 155 Ariz. 1, 744 P.2d 732 (App. Div. 1 1987) (can't use 604 on class 1 felony, might be useful in future).

It is acceptable to aggravate a defendant's sentence for perjury committed during the trial. *State v. McDonald*,156 Ariz. 260, 751 P.2d 576 (App. Div. 2 1987). It is not acceptable to aggravate his sentence because the defendant refuses to admit his guilt. *State v. Holder,* 155 Ariz. 80, 745 P.2d 138 (App. Div. 1 1987) *rev'd on other grounds,* 155 Ariz. 83, 745 P.2d 141 (1987).

A defendant's sentence may be aggravated for uncharged prior incidents. *State v. Cawley,* 133 Ariz. 27, 648 P.2d 142 (App. Div. 2 1978); *State v. Stuck,* 154 Ariz. 16, 739 P.2d 1333 (App. Div. 1 1987). The fact finder may consider the rape victim's age of 16 as an aggravating factor, even though this victim was more sexually experienced than others her age. *Id*.

Although second-degree murder requires the infliction of serious physical injury, (i.e. killing of the victim), a fact finder may also consider the infliction of serious physical injury as an aggravating factor under A.R.S. § 13-701(D)(1) when sentencing for second degree murder. *State v. Inglish,* 129 Ariz. 444, 631 P.2d 1102 (App. Div. 2 1981).

Also for second degree murder, although the jury acquitted defendant of first degree murder and robbery, the sentencing fact finder could still find defendant used a deadly weapon under A.R.S. § 13-701(D)(2). *State v. Meador,* 132 Ariz. 343, 645 P.2d 1257 (App. Div. 1 1982).

Defendant's failure to get help for his victim constituted a cruel and depraved crime under A.R.S. § 13-701(D)(5), despite the defendant's contention he was merely exercising has right to remain silent. *Id*.

A trial court may properly consider a defendant's demeanor during trial to draw conclusions about his/her character in determining the sentence to be imposed. Therefore, the trial court did not err when it considered defendant's improper conduct and demeanor during the trial as a basis for imposing an aggravated sentence. *State v. Schneider,* 148 Ariz. 441, 715 P.2d 297 (App. Div. 1 1985). The number of victims involved, the substantial amounts of money which were stolen, the need to protect society from defendant's criminal activities, the premeditated nature of defendant's crimes, and the fact that while defendant was waiting trial he was involved in similar criminal activities were each factors that were valid matters for trial judge to consider in justifying an aggravated sentence. *Id*.

(ii). Examples of Unacceptable Aggravating Circumstances

The trial court may not consider a defendant's two prior felony convictions as separate aggravating

circumstances but may weigh the factor more heavily when there are multiple convictions. *State v. Provenzino*, 221 Ariz. 364, 368, 212 P.3d 56, 60 (App. Div. 1 2009).

Defendant's Fifth Amendment rights were violated when the court found an aggravating factor to be the defendant's refusal to tell the mother what he had done with the missing child. *State v. Grooms,* 145 Ariz. 439, 702 P.2d 260 (App. Div. 1 1985) (custodial interference). Note: However, the court believed that the fact that the child's whereabouts were unknown could be accepted as an aggravating circumstance. It was the consideration of the fact that defendant had refused to divulge this information that was error.

Trial court could not consider a defendant's prior clean record as an aggravating circumstance. *State v. Just,* 138 Ariz. 534, 551, 675 P.2d 1353, 1370 (App. Div. 1 1983).

The trial court erred in finding aggravating circumstances in a conspiracy case where the conspiracy was never brought to completion. The aggravating circumstances would have been true if the crime had been completed; but since the crime was not completed, the aggravating circumstances did not exist. *State v. Johnson,* 131 Ariz. 299, 302, 640 P.2d 861, 864 (1982). *But see generally State v. Vild,* 155 Ariz. 374, 746 P.2d 1304 (App. Div. 1 1987) (okay to use conspiracy as § 13-604 prior conviction for substantive offense charges).

It was improper to find an aggravating circumstance under A.R.S. § 13-701(D)(4) on grounds that there were two undercover police officers who were acting as part of the conspiracy *Johnson*, *supra.*

> Unarticulated thoughts, unidentified documents, and unattributed statements do not provide 'information' sufficient to support a finding of aggravated circumstances. . . A failure to established the 'true facts necessary for the proper exercise of the statutory sentencing discretion makes the resulting sentence an abuse of discretion.

State v. Jones, 147 Ariz. 353, 355,710 P.2d 463, 465 (1985).

Drug abuse alone does not support an aggravated sentence, unless the abuse played a role in the charged crime. *State v. Grier,* 146 Ariz. 511, 516, 707 P.2d 309, 314 (1985).

Standing by itself, a defendant's inability to maintain steady employment cannot support an aggravated sentence. *Id*.

It was an abuse of discretion for sentencing court to rely on diagnostic and psychological reports for aggravating a sentence knowing the reports were potentially influenced by false convictions exposed in "rap" sheets. The abuse existed also because the court failed to conduct an investigation into how the reports were influenced by the false information. *Id.* at 517, 707 P.2d at 315.

4. Mitigation of Sentence

A.R.S. § 13-701(C) provides that mitigating circumstances must be "found to be true by the court, on any evidence or information introduced or submitted to the court or the trier of fact before sentencing or any evidence presented at trial". Subsection (E) sets forth 4 enumerated mitigating circumstances that the court must consider. They are:

1. The age of the defendant.
2. The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was significantly impaired,

but not so impaired as to constitute a defense to prosecution.

3. The defendant was under unusual or substantial duress, although not to a degree that would constitute a defense to prosecution.

4. The degree of the defendant's participation in the crime was minor, although not so minor as to constitute a defense to prosecution.

5. During or immediately following the commission of the offense, the defendant complied with all duties imposed under sections 28-661, 28-662 and 28-663.

Additionally, the statute provides that the court shall consider "[a]ny other factor that is relevant to the defendant's character or background or to the nature or circumstances of the crime and that the court finds to be mitigating." A.R.S. § 13-701(E)(6). By phrasing A.R.S. § 13-701(E)(6) as it did, "the legislature left flexible the circumstances that may be considered in mitigating a sentence." *State v. Thurlow,* 146 Ariz. 16, 712 P.2d 929 (1986).

A defendant must establish mitigating factors by a preponderance of the evidence. *State v. West*, 176 Ariz. 432, 449, 862 P.2d 192, 209 (1993). The record must show what the information consists of and where if comes from and must indicate that it has some substance above rumor, gossip or speculation. *State v. Jones,* 147 Ariz. 353, 710 P.2d 463 (1985).

Obviously, occasions will arise where there will be both aggravating and mitigating circumstances. In these cases, a judge's discretion will determine whether mitigating circumstances outweigh the aggravating circumstances and call for a lesser term to be imposed. See A.R.S. § 13-702(E).

a. Examples of Acceptable Mitigating Circumstances

The court may consider a defendant's general character, age, health, attitude, moral character, prior criminal record or lack thereof, and the general character of the charged offense as mitigating factors. *State v. Thurlow,* 148 Ariz. 16, 19, 712 P.2d 929, 932 (1986), citing *State v. Mincey*, 141 Ariz. 425, 445, 687 P.2d 1180, 1200 (1984) and *State v. Stotts*, 144 Ariz. 72, 695 P.2d 1110 (1985).

Age is a proper mitigating factor, but only if the defendant lacks substantial judgment due to immaturity or senility. *State v. Germain,* 150 Ariz. 287, 289, 723 P.2d 105, 107 (App. Div. 1 1986).

The defendant's capacity to appreciate the wrongfulness of his actions was impaired during the commission of the crime by either intoxication or the influence of drugs may be considered as a mitigating factor. *See State v. Suniga,* 145 Ariz. 389, 395, 701 P.2d 1197, 1203 (App. Div. 1 1985); *But see State v. De La Garza, infra,* (heroin addiction is not a mitigating factor).

b. Examples of Unacceptable Mitigating Factors

The absence of a factor may not be considered a mitigating circumstance where it would be considered an aggravating circumstance if the factor were present. *Thurlow*, *supra*, at 19, 712 P.2d at 932.

Voluntary intoxication is not a mitigating factor in a reckless manslaughter case. *Germain*, *supra*.

Defendant's heroin addiction was not sufficient to be mitigating factor where the presentence report showed defendant had failed to complete various rehabilitation programs. *State v. De La Garza,* 138 Ariz. 408, 675

P.2d 295 (App. Div. 2 1983).

5. Rulings on the Admissibility of General Types of Evidence

The following is a synopsis of cases that have dealt with the admissibility of various forms of evidence at the pre-sentencing hearing.

a. Confessions

It is fundamental error for a sentencing court to use an involuntary confession to enhance punishment. *State v. Conn,* 137 Ariz. 148, 669 P.2d 581 (1983).

b. Police Reports

"[I]nformation in presentence reports taken from police records are generally admissible." *State v. Marquez,* 127 Ariz. 3, 6, 617 P.2d 787, 790 (App. Div. 1 1980) and *State v. Corral,* 21 Ariz.App. 520, 521 P.2d 151 (App. Div. 2 1974).

c. Juvenile Record

A sentencing judge may consider the juvenile record of an adult defendant when imposing sentence. *State v. Morales,* 110 Ariz. 512, 514, 510 P.2d 1136, 1138 (1974); *Corral, supra; State v. Levitt,* 155 Ariz. 446, 747 P.2d 607 (App. Div. 2 1987).

d. Lie Detector Results

It was not prejudicial error for the court to hear the polygraph test results during the aggravation hearing. (The court refused to admit the results during trial.) *State v. Jones,* 110 Ariz. 546, 521 P.2d 978 (1974), overruled on other grounds, *State v. Conn*, 137 Ariz. 148, 669 P.2d 581 (1983).

"The court was well within its discretion in determining that an additional polygraph would be of no benefit to [defendant] at sentencing and did not commit error by failing to treat his request as a request for a presentence hearing." *State v. Miller,* 120 Ariz. 224, 228, 585 P.2d 244, 248 (1978).

It was not error for the sentencing judge to refuse to admit the defendant's polygraph test results which were to be considered in mitigation of sentence. *State v. Zuck,* 134 Ariz. 509, 514, 658 P.2d 162, 167 (1983).

6. Prior Convictions as Enhancement in Sentencing

A defendant's sentence may be enhanced if he/she has been previously convicted of a felony. The statute governing enhancement of sentence for priors is A.R.S. § 13-604. Please refer to Prosecutor's Manual, Volume II, "Priors for Enhancement" for extensive coverage of this topic.

7. Confrontation and Cross-Examination at the Presentence Hearing

The constitutional rights to cross-examine and confront witnesses under the Sixth and Fourteenth Amendments of the United States Constitution generally do not apply at a pre-sentencing hearing. *State v. Green,* 117 Ariz. 92, 95, 570 P.2d 1265, 1268 (App. Div. 2 1977). This rule has not changed in light of the United States Supreme Court's holdings in *Blakely* or *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354

(2004). *State v. McGill*, 213 Ariz. 147, 159, 140 P.3d 930, 942 (2006). Be aware, though, that the Confrontation Clause applies to the establishment of an aggravating factor. *Id., citing State v. Greenway*, 170 Ariz. 155, 161 n.1, 823 P.2d 22, 28 n.1 (1991).

For example, in *State v. Maxwell,* 116 Ariz. 564, 570 P.2d 506 (App. Div. 2 1977) the court held that a defendant did not have a fundamental right to cross-examine a probation officer who prepared the presentence report. In order to secure a reversal for failure to allow such cross-examination, a defendant must show preservation of the question for appeal and that the refusal to allow the cross-examination was prejudicial. *State v. Schoonover,* 128 Ariz. 411, 626 P.2d 141 (App. Div. 1 1981).

However, the right to discovery may attach to a sentencing hearing. *Id*. citing *State v. Donahoe,* 118 Ariz. 37, 574 P.2d 830 (App. Div. 2 1977). Further,

> [w]hile it is true that the right [of confrontation in cross-examination] does not apply to the presentence hearing, this rule is not applicable once the state has produced a witness and allows him to testify. Under such circumstances the right to cross-examination exists and it may not be unduly restricted.

Donahoe at 46, 574 P.2d at 839. Absent any waiver, any denial of the right to cross-examination is constitutional error and even if no prejudice was shown, the error still would not be cured. *Id*., citing *Brookhart v. Janis,* 384 U.S. 1, 86 S.Ct. 1245 (1966). It appears that the exception swallows the general rule.

VI. THE PRE-HEARING CONFERENCE

A. Purpose

Rule 26.7(c) permits the court, on its own initiative or on the motion of the parties, to hold a pre-hearing conference prior to the pre-sentencing hearing. See Rule 26.7(c), comment. The purpose of a pre-hearing conference is to help the parties to determine and limit the matters to be disputed or to otherwise accelerate the pre-sentencing hearing. Rule 26.7(c). The probation officer who prepared the presentence report may be ordered by the court to attend the conference. Rule 26.7(c). This is to allow him/her explain any matters in dispute which he/she may be directly involved with.

B. Time Requirements

Rule 26.7(c) permits the court at the conference to delay the date of sentencing up to 10 days beyond the 60 day maximum extension permitted by Rule 26.3(b). The pre-sentencing hearing is to be delayed accordingly. Rule 26.7(c). Thus, the sentencing may be postponed up to an aggregate of 70 days after the determination of guilt. *See also* Rule 26.5, comment. This extension exists "in order to allow the probation officer to investigate any matter specified by the court, or to refer the defendant for mental health examination or diagnostic tests." Rule 26.7(c).

C. Presence of the Defendant

The defendant is entitled – but not required - to be present at the pre-sentencing hearing. Rule 26.9.

VII. THE SENTENCING

A. Presence of Defendant

The defendant is required to be present at sentencing. See Rule 26.9. *See also State v. Fettis*, 136 Ariz. 58, 664 P.2d 208 (1983) (overruling prior cases which had held sentencing *in absentia* to be permissible but upholding the practice of trying, convicting and finding the defendant guilty *in absentia*). This right includes the right to be present and heard when the court considers whether to designate an undesignated offense as a felony. *State. v. Benson*, 176 Ariz. 281, 283-84, 860 P.2d 1334, 1336-37 (App. Div. 1 1993).

Under *Fettis*, only extraordinary circumstances may justify a sentencing *in absentia*. If extraordinary circumstances are not demonstrated in the record, the sentence must be vacated. *See e.g. State v. LeMaster*, 137 Ariz. 159, 669 P.2d 592 (App. Div. 1 1983). A defendant's prior refusal to be transported to court does not meet the extraordinary circumstances test to permit sentencing to proceed without the defendant's physical presence in the courtroom. *State v. Forte*, 222 Ariz. 389, 393, 214 P.3d 1030, 1034 (App. Div. 2 2009). "Of course, the right to be present at the pronouncement of sentence may be waived, if the waiver is knowing." *State v. Pyeatt*, 135 Ariz. 141, 143, 659 P.2d 1286, 1288 (App. Div. 1 1982); *see also Forte, supra*. If, however, the defendant is present by video conference, the Rule 26.9 error is not structural because he could hear essential warnings and information about his right to appeal. *Forte* at 394, 214 P.3d at 1035.

Furthermore, Rule 26.9 requires the defendant's presence at his/her sentencing, and does not require it at an aggravation hearing, *State v. Roberts,* 144 Ariz. 572, 574, 698 P.2d 1291, 1293 (App. Div. 1 1985) (trial court correctly held an aggravation hearing even though defendant was voluntarily absent), or when the payment schedule for a court assessment is announced. *State v. Snead,* 175 Ariz. 197, 198, 854 P.2d 1183, 1184 (App. Div.1 1993).

The 1993 amendment to Rule 26.9 deleted language to comply with the Supreme Court's decision prohibiting sentencing *in absentia*. The defendant is not permitted to extend the time for taking an appeal by non-appearance at sentencing unless the defendant is absent at the sentencing through no fault of his own. Rule 26.9, comment. In that case, he/she may be entitled to a delayed appeal under Rule 32. *Id*.

B. Pronouncement of Judgment and Sentence

1. Pronouncement of Judgment

Judgment is "the adjudication of the court based upon the verdict of the jury, upon the plea of the defendant or upon its own finding following a non-jury trial, that the defendant is guilty or not guilty" Rule 26.1(a). Once a judgment of guilty is declared, then the court will sentence the defendant. See Rule 26.1(b).

The rule mandates certain requirements to be met when pronouncing judgment. Rule 26.10. First, the court must set forth the defendant's plea. Second, the court must also set forth the offense of which the defendant was convicted or found guilty. Finally, a determination must be made of whether the declared offense falls in the categories of dangerous, nondangerous, and repetitive or non-repetitive. See A.R. S. § 13-604 (statute for enhancement based on dangerous and repetitive crimes).

While the Arizona Court of Appeals has stated that adherence to Rule 26.10 is preferred, unless a substantial right of a defendant is prejudiced, a technical error in pronouncing judgment should not require resentencing.

See State v. Maddasion, 24 Ariz.App. 492, 593 P.2d 966 (App. Div. 2 1975) (sentencing court's failure to set forth defendant's plea did not require a resentencing because no prejudice occurred).

2. Pronouncement of Sentence

The pronouncement of sentence follows the pronouncement of judgment. The requirements which a court must follow in pronouncing sentence are set forth in Rule 26.10(b).

a. Defendant's Right to Allocution

The first requirement mandates a court to "[g]ive the defendant an opportunity to speak on his or her own behalf." Rule 26. 10(b)(1). In complying with this requirement, it has been stated that the better practice would be for the trial judge to unambiguously address the defendant by name in asking the questions. *State v. Ballantyne,* 128 Ariz. 68, 72, 623 P.2d 857, 861 (App. Div. 2 1981). However, a defendant's right to speak on his own behalf, (otherwise known as his right to allocution), is not denied if the defendant's attorney answers for the defendant. *Id. See also State v. Dixon,* 127 Ariz. 554, 622 P.2d 501 (App. Div. 2 1980); *State v. Garrison,* 25 Ariz.App. 470, 544 P.2d 687 (App. Div. 1 1976); *State v. Davis,* 112 Ariz. 140, 539 P.2d 897 (1975). A court's failure to consider a defendant's statement and to instead rely entirely upon a report made by the probation department in imposing sentence is improper and will require resentencing. *State v. Nelson,* 122 Ariz. 1, 592 P.2d 1267 (1979). However, "even if a court forgets to invite the defendant to speak, there is no need for resentencing unless the defendant can show that he would have added something to the mitigating evidence already presented ." *State v. Hinchey,* 181 Ariz. 307, 313, 890 P.2d 602, 608 (1995).

b. Statement by Court Demonstrating Credit Time Considered

The second provision of 26.10(b) merely directs the court to "[s]tate that it has considered the time the defendant has spent in custody on the present charge." Rule 26.1 0(b)(2). The actual crediting of time spent in custody is provided for in the fourth requirement. Thus, this second requirement appears to be met merely by the court making a verbal statement. While adherence to this requirement is preferred, in *State v. Maddasion,* 24 Ariz.App. 492, 496, 539 P.2d 966, 970 (App. Div. 2 1975), the court held that resentencing was not required where the trial court failed to state that it had considered the time defendant had been incarcerated in determining sentence. Here, no prejudice to defendant was found to have recurred through the trial court's failure. *See also State v. Rodriguez,* 116 Ariz. 276, 569 P.2d 218 (1977).

c. Explanation of Sentence Terms

The Rule's third requirement commands the court to explain the terms of the sentence or probation to the defendant Rule 26.10(b)(3).

> The explanation of the sentence should include the terms of probation, the length and order of sentences if there are more than one, and whether the new sentence is to be tacked onto or served concurrently with a sentence which the defendant is then serving.

Rule 26.10 comment. Under the rule, there appears to be no affirmative duty for the judge to reassure himself or herself that the defendant fully understands the conditions imposed. The judge does not have to inform the defendant about parole eligibility at the time of sentencing. *State v. Tarango,* 182 Ariz. 246, 252, 895 P.2d 1009, 1015 (App. Div. 1 1994).

d. Specification of Commencement Date and Computation of Time

Under the first part of the fourth requirement, the court is ordered to "[s]pecify the commencement date for the term of imprisonment." Rule 26.10(b)(4). The comment to the rule interprets this to meant that "[s]ince the court has discretion over the date on which the term of sentence or probation is to begin ... the court should specify the date." However, under A.R.S. § 13-7 12, the court does not have discretion over the commencement date. Thus, the statute differs with the rule. In such cases, if the court deems the rule to be procedural, the rule will override the statute. *See State v. Robinson,* 153 Ariz. 191, 735 P.2d 801 (1987).

The second half of the fourth requirement instructs the court to compute the time to be credited against the defendant's sentence as required by law. Rule 26.1 0(b)(4). The "law" which covers credit time is A.R.S. § 13-712(B) through (E). This statue is mandatory and gives the sentencing court no discretion in the matter. *State v. Williams,* 128 Ariz. 415, 626 P.2d 145 (App. Div. 2 1981). A defendant is only entitled to credit on his sentence for "time actually spent in custody." A.R.S. § 13-709(B). *See State v. Rosu,* 131 Ariz. 276, 640 P.2d 207 (App. Div. 1 1981).

The following is a list of cases which have dealt with various credit time issues.

State v. Bridgeforth, 156 Ariz. 58, 750 P.2d 1 (App. Div. 1988).

> Defendant was held on a federal probation violation hold. The court could not give him credit for this time when he pled guilty to an Arizona offense.

State v. Pena, 140 Ariz545, 548, 683 P.2d 744, 747 (App. Div. 1 1983).

> Credit for time served does not change the statutory designated time for a sentence, it only shortens the time necessary for completion of sentence.

State v. Cruz-Mata, 138 Ariz. 370, 375-76, 674 P.2d 1368, 1373-74 (1983).

> A defendant's time spent in presentence custody should be credited to each concurrent sentence. *But see Sodders, infra.*

State v. Sodders, 130 Ariz. 23, 30, 633 P.2d 432,439 (App. Div. 1 1981).

> Here, it was held that presentence incarceration credit does not have to be given on each consecutive sentence imposed.

State v. Houisberger, 133 Ariz. 569, 653 P.2d 26 (App. Div. 2 1982).

> Defendant was not entitled to credit time for time spent in two other states even though Arizona had a "hold" on him, because the time spent was not "pursuant to" his Arizona offense.

State v. Mahler, 128 Ariz. 429, 430, 626 P.2d 593, 594 (1981).

> Defendant was entitled to credit for time spent in the custody of another state because his arrest was pursuant to an Arizona offense.

State v. Thomas, 133 Ariz. 533, 540, 652 P.2d 1380, 1387 (1982).

A.R.S. § 13-712 requires crediting time served against the minimum portion of a sentence in the same manner as against any other determinate period of imprisonment. Thus the judge erred in crediting the defendant's time served in custody against the life portion of the term imposed but not against the term for parole eligibility. (Defendant got life without possibility of parole for 25 years).

State v. San Miguel, 132 Ariz. 57, 643 P.2d 1027 (App. Div. 1 1982).

The defendant was not allowed credit time for the time spent in custody where that time was accumulated due to a petition to revoke probation and not on the charge. Here, defendant had been given probation in cause #1. Subsequently, he was arrested for cause #2. The trial court ordered that the defendant be released on his own recognizance for #2, but he was to be held without bond on a petition to revoke probation for #1. The time he spent in jail up to the revocation proceeding was held not to be pursuant to charge #2 and, therefore, when defendant was sentenced for #2, he was not entitled to credit for time served.

State v. Williams, 128 Ariz. 415, 626 P.2d 145 (App. Div. 2 1981).

Defendant was not entitled to credit for the time spent in jail while awaiting sentence on each of the concurrent sentences. Here, the second offense (aggravate assault) accused while defendant was awaiting dispose him of the first charge (unlawful possession of marijuana).

State v. Rosu, 131 Ariz. 276, 640 P.2d 207 (App. Div. 1 1981).

"[A] defendant is only entitled to credit on his sentence for "time actually spent in custody". (Citing A.R.S. § 13-709(B). Thus, the defendant's sentence could not be credited with the days earned as good-time credits. (Jail time was a condition of his probation.)

e. Obtaining Defendant's Fingerprint

Rule 26.1 0(b)(5) requires the defendant to affix his or her right index fingerprint to the sentencing minute entry and order for all felony convictions as well as convictions for theft, shoplifting and DUI. If the defendant commits another offense for which this conviction will serve as a sentencing enhancement, the fingerprint will help you prove the prior conviction, so be sure that the defendant gives a clear fingerprint.

f. Ordering Reports to D.O.C.

The final precept of Rule 26.10(b) is self-explanatory. It merely instructs the court to "[d]irect the Clerk of the Court to send to the Department of Corrections, along with the sentencing order, copies of all presentence reports, probation violation report, medical and mental health reports prepared as to or relating to the defendant sentenced." Rule 26. 10(b)(6).

C. Court's Duty After Pronouncing Sentence

Rule 26.11 sets forth the duties a court has after pronouncing sentence. The rule is so straight forward and clear that no case law exists on it. Therefore, it is quoted below.

After trial, the court shall, in pronouncing judgment and sentence:

a. Inform the defendant of his right to appeal from the judgment, sentence or both and

advise the defendant that failure to tile a timely appeal will result in the loss of the right to appeal.

b. If he is entitled thereto, advise the defendant that:

(1) If he is indigent, as defined in Rule 6.4(a)[*], the court will appoint counsel to represent him or her on appeal; and

(2) If he is unable to pay for a certified copy of the record on appeal and the certified transcript, they will be provided by the county.

c.Hand the defendant a written notice of these rights and the procedures the defendant must follow to exercise them, receipt of which shall be shown affirmatively in the record.

*Rule 6.4(a) defines "indigent" as a person who is not financially able to employ counsel.

The comment to Rule 26.11 states that "[t]he language of the rule is broad enough to cover procedures both in record and non-record courts." In non-record courts, "the defendant will be informed of his right to *de novo* appeal under Rule 30, and his right to counsel, if any, under Rule 6.1(b)."

The comment also explains that "[i]n superior court the procedures of paragraphs (a) and (b) are already part of present practice. Notice of appeal forms, Form 23 and indigency questionnaires, Form 5(a), should be available at sentencing. The warning in (a) will include alerting the defendant to the preclusion in Rule 32.2." That rule sets forth the circumstances under which a defendant is not entitled to post conviction relief.

Furthermore, the comment to Rule 26.11 explains that

> [t]he defendant's trial counsel, whether private or appointed, has a duty under Rule 6.3(b) to advise his client whether or not an appeal would be beneficial and to continue representing the defendant if an appeal is taken, unless he shows good cause why he should be allowed to withdraw. Form 23 should be used to notify the defendant of his rights to appeal and to counsel on appeal.

D. Imposing a Fine and/or Restitution

When imposing punishment on a defendant, a court is permitted to order the defendant to pay restitution to the victim, A.R.S. § 13-804, or to pay a fine. See A.R.S. § 1 3-603(E)-(F). The method to be followed in paying a fine and/or restitution is covered in parts (a) and (b) of Rule 26.12. These provisions instruct a court to permit the payments of fine and/or restitution to be made within a specified period of time or in specified installments, and, unless otherwise directed by the court, to have such payments made to the court. Rule 26.12(a) and (b). *See also* A.R.S. § 13-801, et. seq. (covers fines and restitution in great detail).

Rule 26.12(c) sets forth the action to be taken when a defendant fails to pay a fine and/or restitution. The four sections of part (c) state:

> *(1) For Defendants Not on Supervised Probation.* If a defendant fails to pay a fine, restitution, or other monetary obligation, or is known by the court to have failed to comply with a term or condition of sentence within the prescribed time, the court shall, within 5 days, notify the prosecutor.
>
> *(2) For Defendants on Supervised Probation*. If a defendant on supervised probation fails to pay a fine,

restitution, or other monetary obligation, or is known by the court to have failed to comply with any other term or condition of probation within the prescribed time, the court shall give notice of such failure to the defendant's probation officer within the time limits set under sections (c)(1) and (3).

(3) Time limits--Restitution and Non-Monetary Obligations. If the payment or performance of an obligation does not involve the court, delinquency times shall run from the date on which the court or the probation officer becomes aware of failure to pay or comply.

(4) Court Action upon Failure of Defendant to Pay Fine, Restitution, or Other Monetary Obligation or to Comply with Court Orders. Upon the defendant's failure to pay a fine, restitution, or other monetary obligation, or failure to comply with court orders, the court may require the defendant to show cause why said defendant should not be held in contempt of court and may issue a summons or warrant for the defendant's arrest.

See also A.R.S. § 13-8 10 (code section dealing with failure to pay fine or restitution).

1. Fines and Restitution In General

"Although restitution to a victim of crime is not a criminal punishment enacted by the state, it must nevertheless rest upon due process of law." *State v. Reese,* 124 Ariz. 212, 215, 603 P.2d 104, 107 (App. Div. 1 1979). This means that a defendant must be given an opportunity to contest the information on which the award is based, including the opportunity to present relevant evidence. *State v. Fancher,* 169 Ariz. 266, 267-68, 818 P.2d 251, 252-53 (App. Div. 1 1991), Furthermore, the defendant be present when the court addresses the issue. *State v. Lewus,* 170 Ariz. 412, 414, 825 P.2d 471, 473 (App. Div. 1 1992).

[A] defendant may be ordered to pay restitution only on charges that he admitted, on which he has been found guilty, or upon which he has agreed to pay restitution. *State v. Pleasant,* 145 Ariz. 307, 701 P.2d 15, 16 (App. Div. 1 1985). Therefore, the defendant could not be ordered to pay restitution to the victims for counts three and four where he had admitted guilt on only counts one and two. *Id. See also State v. Skiles,* 146 Ariz. 153, 704 P.2d 283 (App. Div. 2 1985) (restitution could not be imposed as part of defendant's sentence where defendant had pled guilty to leaving the scene of the accident but there had been no showing made that he was at fault in the accident); *State v. Monick,* 125 Ariz. 593, 611 P.2d 946 (App. Div. 1 1980) (trial court's order of restitution to a victim of an unrelated crime to which defendant had neither admitted guilt, been adjudicated guilty, nor agreed to pay restitution was erroneous.) *Compare State v. Cummings,* 120 Ariz. 69, 583 P.2d 1389 (App. Div. 1 1978) (defendant may be required to pay restitution to the victim of a separate uncharged crime where defendant admits his responsibility for it).

Nevertheless, even though it is an abuse of discretion for a sentencing judge to require restitution by a defendant for a crime in which there is no admission or adjudication of guilt or liability, restitution may be imposed if the defendant, in a plea agreement or otherwise, consents to such restitution. *State v. Reese,* 124 Ariz. 212, 214-15, 603 P.2d 104, 106-07 (App. Div. 1 1979). Imposition of restitution is mandatory for crimes for which defendant was convicted. *State v. Weston,* 155 Ariz. 247, 745 P.2d 994 (App. Div. 1 1987).

E. Concurrent or Consecutive Sentences

1. Presumption of Consecutive Sentences

When imposing separate sentences of imprisonment on a defendant for 2 or more offenses, whether they are

charged in the same indictment or information, the court is to make such sentences run consecutively unless the judge expressly directs otherwise. Rule 26.13. A.R.S. § 13-711(A) requires the court to set forth its reasons for imposing concurrent sentences.

2 Consecutive Sentences for Offenses Committed on the Same Occasion

Consecutive sentences may be imposed for conduct committed on the same occasion, such as consecutive sentences for rape and murder. *State v. Cartwright*, 155 Ariz. 308, 313, 746 P.2d 478, 483 (1987). However,

> [a]n act or omission which is made punishable in different ways by different sections of the law may be punished under both, but in no event may sentences be other than concurrent.

A.R.S. § 13-116. Whether punishment is sought for one act by two different offenses turns on an identical elements test. The test is applied by eliminating the evidence supporting the elements of one charge and then determining whether the remaining evidence supports the elements of the other charge. *State v. Woods*, 141 Ariz. 446, 457, 687 P.2d 1201, 1212 (1984). *See also State v. Siddle*, 202 Ariz. 512, 47 P.3d 1150 (App. Div. 2 2002). If the defendant's conduct in the lesser act caused a different or additional risk of harm than that inherent in the ultimate crime, consecutive sentences may be imposed. *State v. Gordon*, 161 Ariz. 308, 778 P.2d 1204 (1984). Time span is not material to the test. *State v. Verive*, 128 Ariz. 570, 627 P.2d 721 (App. Div.1 1981).

The jury does not have to find beyond a reasonable doubt that the crimes for which the defendant was convicted constituted separate acts pursuant to A.R.S. § 13-116 in order to permit the trial court to impose consecutive sentences. *State v. Urquidez*, 213 Ariz. 50, 53, 138 P.3d 1177, 1180 (App. Div. 2 2006).

The following is a sample of cases in which appellate courts used the identical elements test to determine whether consecutive sentences were appropriate.

a Consecutive Sentences Permissible

Unlawful flight and resisting arrest where defendant fled from police in his car then resisted arrest after the car went into the water. *State v. Stock*, 220 Ariz. 507, 509, 207 P.3d 760, 762 (App. Div. 1 2009).

Aggravated assault with a deadly weapon and misconduct involving weapons where former charge involved shooting at the victim and latter charge was for shooting at the victim's car. *State v. Urquidez*, 213 Ariz. 50, 52-53, 138 P.3d 1177, 1179-80 (App. Div. 2 2006).

Escape and resisting arrest. *State v. Stroud*, 209 Ariz. 410, 414-15, 103 P.3d 912, 916-17 (2005).

First degree murder and burglary. Victim suffered additional risk of harm than that inherent in the killing. *State v. Runningeagle*, 176 Ariz. 59, 66-67, 859 P.2d 169, 176-77 (1993).

Conspiracy to commit murder and kidnapping where homicide could have been accomplished without kidnapping. *State v. Styers*, 177 Ariz. 104, 113-14, 865 P.2d 765, 774-75 (1993). *See also State v. Jimenez*, 165 Ariz. 444, 799 P.2d 785 (1990).

Aggravated assault and attempted murder. Defendant left after stabbing victim, then resumed stabbing victim after returning. *State v. Beaty*, 158 Ariz. 232, 245, 762 P.2d 519, 532 (1988).

First degree murder and armed robbery where defendant demanded victim's wallet and threatened him with a gun before shooting him. *State v. Rumsey*, 130 Ariz. 427, 430, 636 P.2d 1209, 1212 (1981). *But see State v. Ferguson*, *infra*.

Felony murder and arson. *State v. Girdler*, 138 Ariz. 482, 489, 675 P.2d 1301, 1308 (1983).

Two counts of assault where two victims were injured by a single act of throwing acid. *State v. Gunter*, 132 Ariz. 64, 69, 643 P.2d 1034, 1039 (App. Div. 1 1982). *See also State v. Henley*, 141 Ariz. 465, 467-68, 687 P.2d 1220, 1222-23 (1984) (single bullet passed through one victim and struck a second).

Aggravated assault and armed robbery where shots fired constituted increased risk of harm. *State v. Washington*, 132 Ariz. 429, 432-33, 646 P.2d 314, 317-18 (App. Div. 1 1982).

Conspiracy to transport marijuana and transportation of marijuana. *State v. Roseberry*, 210 Ariz. 360, 370, 111 P.3d 402, 412 (2005). *But see State v. Garcia*, 121 Ariz. 417, 590 P.2d 1363 (1979) (overt act necessary for conspiracy conviction same as that for the substantive offense so sentences must be concurrent).

Sexual conduct with a minor and child abuse. The jury could have found that the defendant acted as an accomplice or a principal when she twice gave her daughter permission to live with an adult man. *State v. Maldonado*, 206 Ariz. 339, 343, 78 P.3d 1060,1064 (App. Div. 1 2003).

Child molestation and aggravated battery where the victim suffered facial and vaginal injuries. *State v. Torres*, 27 Ariz. App. 556, 559-60, 556 P.2d 1159, 1162-63 (App. Div. 1 1976).

b Consecutive Sentences Prohibited

Defendant's use of a gun in armed robbery, aggravated robbery and aggravated assault created the same risk for the victim, thereby precluding consecutive sentences. *State v. Price*, 218 Ariz. 311, 315-16, 183 P.3d 1279, 1283-84 (App. Div. 2 2008).

Attempted murder and misconduct involving weapons where it was factually impossible to commit the ultimate crime without also committing misconduct involving weapons. *State v. Carreon*, 210 Ariz. 54, 74, 107 P.3d 900, 920 (2005).

Kidnapping and sexual assault where defendant held victim at knife point and moved her to another room before sexually assaulting her. *State v. Eagle*, 196 Ariz. 27, 33, 992 P.2d 1122, 1128 (App. Div. 1 1998).

Armed robbery and theft of means of transportation which constituted the same conduct of telling victim he had gun and taking car. *State v. Lee*, 185 Ariz. 549, 560, 917 P.2d 692, 703 (1996).

Burglary and sexual assault where defendant entered victim's home with the intent to commit the sexual assault must be sentenced concurrently because there was no additional risk of harm. *State v. Gordon*, 161 Ariz. 308, 3 14-15, 778 P.2d 1204, 1210-11 (1989). *But see State v. White*, 160 Ariz. 24,

770 P.2d 328 (1989).

Several counts of sexual conduct with a minor involving one sexual act must be sentenced concurrently, but the corresponding counts of sexual exploitation for taking pictures of the act may be sentenced consecutively because the act of taking each photograph was a separate one. *State v. Taylor*, 160 Ariz. 415, 419-20, 773 P.2d 974, 978-79 (1989).

Impaired DUI and BAC DUI. *Anderjeski v. Mesa City Court*, 135 Ariz. 549, 663 P.2d 233 (1983).

First degree murder and armed robbery where elimination of evidence supporting murder charge did not leave sufficient evidence to convict on armed robbery. *State v. Ferguson*, 119 Ariz. 55, 61, 579 P.2d 559, 565 (1978). *But see Rumsey*, *supra*.

Possession of heroin for sale and transportation of heroin. *State v. Celaya*, 27 Ariz. App. 564, 556 P.2d 1167 (App. Div. 2 1976). *See also State v. Sumter*, 24 Ariz. App. 131, 536 P.2d 252 (App. Div. 1 1975).

Aggravated assault and robbery where the force used to subdue the victim was the same necessary to commit the robbery. *State v. Jorgenson*, 108 Ariz. 476, 502 P.2d 158 (1972). *See also State v. Williams*, 108 Ariz. 382, 499 P.2d 97 (1972).

Attempted kidnapping with a gun and aggravated assault with a gun. *State v. Mitchell*, 106 Ariz. 492, 478 P.2d 517 (1970).

F. Resentencing

Based on the standards for resentencing adopted by the Supreme Court in *North Caroline v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969), the Arizona courts have developed Rule 26.14. The rule states:

> Where a judgment or sentence, or both, have been set aside on appeal, by collateral attack or on a post-trial motion, the court may not impose a sentence for the same offense, or a different offense based on the same conduct, which is more severe than the prior sentence unless (1) it concludes, on the basis of evidence concerning conduct by the defendant occurring after the original sentencing proceeding, that the prior sentence is inappropriate, or (2) the original sentence was unlawful and on remand it is corrected and a lawful sentence imposed, or (3) other circumstances exist under which there is no reasonable likelihood that the increase in the sentence is the product of actual vindictiveness by the sentencing judge.

Rule 26.14.

Clearly, the rule concerned itself primarily with double jeopardy and prosecutorial vindictiveness. Cases that have raised issues in regard to resentencing are covered below.

1. In General

"A trial court has no inherent power to change a sentence already lawfully imposed. Once a defendant begins to serve a lawful sentence, he may not be sentenced to an increased term." Therefore, the trial court erred when it vacated the original sentences which it had imposed due to them being under the presumptive sentences, and then later imposed new increased sentences. *State v. Suniga*, 145 Ariz. 389, 393, 701 P.2d 1197, 1201 (App. Div. 1 1985).

"If an increased sentence is imposed, the sentencing judge must articulate the reasons for increasing the sentence, which may be based upon information made available to the court subsequent to the first trial regarding the defendant's life, health, habits, conduct, and mental and moral propensities." *State v. Smith*, 162 Ariz. 123, 124-25, 781 P.2d at 602-603 (App. Div. 2 1989), citing *State v. Macumber*, 119 Ariz. 516, 582 P.2d 162 (1978).

Additionally, the trial court may impose a sentence for one count that is greater than that imposed in the original sentencing if the sum of the sentences imposed is not greater than the original total sentence. In *Smith*, the defendant was sentenced after trial to 15 years for sexual conduct with a minor to be served consecutively to 5 years for attempted sexual conduct with a minor. On appeal, the convictions were vacated and defendant subsequently pled guilty to one count of attempted sexual conduct. The trial judge, citing *Pearce*, then imposed a 10 year sentence. The Court of Appeals upheld the new sentence because, although it was numerically larger, the practical effect was to reduce the defendant's sentence. *Id*. at 125,781 P.2d at 603.

Note: Rule 24.3 does not permit a trial court to modify an unlawful sentence or one imposed in an unlawful manner. *State v. Hanson*, 138 Ariz. 296, 674 P.2d 850 (App. Div. 2 1983). While the court has authority to modify conditions of probation, it has no authority to modify a jail sentence imposed in a plea agreement as a condition of probation. *State v. Rutherford*, 154 Ariz. 486, 744 P.2d 13 (App. Div. 1 1987).

2. Speedy Sentencing

The defendant was not denied his right to a fair and speedy trial where he was re-sentenced six years after the original sentence, because the right to a speedy trial does not extend to sentencing. *State v. Richmond*, 136 Ariz. 312, 316, 666 P.2d 57, 61 (1983). *See also State v. Jordan*, 137 Ariz. 504, 672 P.2d 169 (1983).

3. Procedure

It was improper to re-sentence the defendant without the aid of a new presentence report once the original presentence report was shown to have contained various mistakes relating to his past criminal history. *State v. Grier*, 146 Ariz. 511, 517, 707 P.2d 309, 315 (1985).

The state was not barred at the resentencing from proving that the murder was committed in expectation of anything of pecuniary value, (even though it had not been proved at the original sentencing), because the law as to the judicial construction of the statute had been clarified between the original sentencing and resentencing. *State v. Carriger*, 143 Ariz. 142, 692 P.2d 991 (1984).

Burden of proof was on defendant in proving that his resentencing denied him his constitutional right to a fair and impartial tribunal. *State v. Jeffers*, 135 Ariz. 404, 432, 661 P.2d 1105, 1133 (1983).

There was no error committed by the resentencing court in this death penalty case when it considered two aggravating factors not found at the initial sentencing. *State v. Gretzler*, 135 Ariz. 42, 49, 659 P.2d 1, 8 (1983).

G. Special Procedures Upon Imposition of a Sentence of Death

"Appeal in death cases is virtually automatic." Rule 26.15, comment. In fact, Rule 31.2(b) explicitly provides for automatic appeal when a defendant is sentenced to death. In order to supplement this rule, the Arizona Supreme Court has propagated Rule 26.15. See Rule 26.15, comment. Rule 26.15 states: "After Imposing a sentence of death, the court shall order the clerk to file a notice of appeal from judgment and

sentence." Once the appeal is made and the Supreme Court affirms the death sentence, the Supreme Court has the duty to set the date of execution. See Rule 31.17(c). The provisions governing capital sentencing are A.R.S. § 13-75 1 et seq.

VIII. ENTRY OF JUDGMENT AND SENTENCE

A. Judgment

As previously mentioned in this manual, a judgment of conviction becomes valid at the moment it is orally pronounced in open court. Rule 26.16(c). Remember that a judgment of conviction is the formal decree made by the court establishing that the defendant is guilty. Once pronounced, the court shall then enter the exact terms of the judgment, along with terms of sentence, in the court's minutes. Rule 26.16(b). The judgment becomes "complete, valid and appealable only when it is orally pronounced in open court and entered on the clerk's minutes." *State v. Rendel*, 18 Ariz. App. 201, 205, 501 P.2d 42, 46 (App. Div. 1 1972).

B. Sentence

The sentence a defendant receives is also valid at the moment it is orally pronounced in open court. Rule 26.16(a). " [S]entence or suspended sentence and probation is final and appealable at the time of its 'pronouncement' by the court." *Burton v. Superior Court of Maricopa County*, 27 Ariz.App. 797, 800, 558 P.2d 992, 995 (App. Div. 1 1977). Once pronounced, the court shall then enter the exact terms of the sentence, along with judgment, in the court's minutes. Rule 26.16(b). The sentencing judge must then sign a certified copy which goes to the appropriate officer. Rule 26.16(b). From then on, "[n]o other authority shall be necessary to carry into execution any sentence entered therein". Rule 26.16(b). "If the sentence is for death or imprisonment, the appropriate officer shall receive the defendant for execution of the sentence upon delivery to him of a certified copy of the entry in the court's docket." Rule 26.16(b).

C. Conflict Between Oral Pronouncement, Minute Entry, and Written Judgment and Sentence

"Where there is a discrepancy between the oral sentence and the written judgment, the oral pronouncement of sentence controls." *State v. Hanson*, 138 Ariz. 296, 304-05, 674 P.2d 850, 858-59 (App. Div. 2 1983). *But see State v. Bowles*, 173 Ariz. 214, 841 P.2d 209, (App. Div. 1 1992) (holding that the language in *Hanson* is dicta and inapplicable where it is unclear whether the transcript or the minute entry accurately reflected what the judge actually said).